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City of San Jose and Defendant Debra Figone,
10 in Her Official Capacity

11 **IN THE SUPERIOR COURT FOR THE**
12 **COUNTY OF SANTA CLARA**

13 SAN JOSE POLICE OFFICERS
ASSOCIATION,

14 Plaintiff,

15 v.

16 CITY OF SAN JOSE, BOARD OF
17 ADMINISTRATION FOR POLICE AND
FIRE RETIREMENT PLAN OF CITY OF
18 SAN JOSE, and DOES 1-10 inclusive,

19 Defendants.

20 AND RELATED CROSS-COMPLAINT
21 AND CONSOLIDATED ACTIONS
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Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928,
112CV226570, 112CV226574, 112CV227864,
and 112CV23360]

**DEFENDANT CITY OF SAN JOSE'S
SUPPLEMENTAL MOTION *IN LIMINE*
TO EXCLUDE AFSCME WITNESSES
CAROL GARCIA AND PEGGY HORNING
FROM TESTIFYING AT TRIAL**

Date: July 12, 2013
Time: 9:00 a.m.
Dept.: 2

Complaint Filed: June 6, 2012
Trial Date: July 22, 2013

1 The City requests the Court exclude AFSCME witnesses Carol Garcia and Peggy Horning
2 from testifying at trial because AFSCME has refused to timely produce them for deposition.

3 **Relevant Facts**

4 In its April 23, 2013 Pre-Trial Order, the Court ordered that, “[a]ny witness designated
5 either as a trial witness by brief statement or as a witness by declaration shall be made available
6 for deposition as requested.” (Supporting Declaration of Michael C. Hughes (“Hughes Decl.”),
7 ¶2, Ex. A [Order at 4:2-4].)

8 On June 20, 2013, AFSCME first informed the City that it intended to call Carol Garcia
9 and Peggy Horning as trial witnesses. (Hughes Decl., ¶3, Ex. B.) On June 24, 2013, the City
10 noticed the deposition of Ms. Garcia for July 1, 2013 and of Ms. Horning for July 8, 2013 at 1:00
11 p.m. (Id. at ¶4, Ex. C.) AFSCME responded that its counsel was not available and requested that
12 all depositions be noticed for later dates. (Id. at ¶5, Ex. D.)

13 The City subsequently provided several dates for depositions. (Hughes Decl., ¶¶6, 7, Exs.
14 E, F.)

15 In response, AFSCME informed that City that: “Carol Garcia is out of town and
16 unavailable starting tomorrow (June 28) through July 19.” (Hughes Decl., ¶8, Ex. G [June 27,
17 2013, Email from AFSCME attorney V. Soroushian].) *Friday, July 19th is the last business day*
18 *before the Monday, July 22nd trial.*

19 AFSCME subsequently refused to make Peggy Horning available until the week before
20 trial. (Hughes Decl., ¶11, Ex. J [July 2, 2013, Email from AFSCME attorney V. Soroushian].)

21 **Discussion**

22 The Court ordered the parties to make their trial witnesses available for deposition as
23 requested, and AFSCME has refused to timely produce Ms. Garcia and Ms. Horning.
24 Consequently, they Court should exclude them from testifying at trial. If information is requested
25 in discovery and not provided, that information cannot be offered into evidence at trial. *Thoren v*
26 *Johnston & Washer*, 29 Cal.App.3d 270 (1972); *Deeter v. Angus*, 29 Cal.App.3d 270 (1972).
27 Notably, those cases provide that the party seeking exclusion need not have moved to compel
28

1 production. Those cases stand for the proposition of basic fairness. A party cannot use evidence
2 at trial that is relevant and requested during discovery, but which was not produced.

3 Furthermore, AFSCME's refusal to timely produce Ms. Garcia and Ms. Horning violates
4 this Court's April 23, 2013 Order (requiring parties to produce witness "as requested") and is
5 objectionable on that basis as well.

6
7 DATED: July 3, 2013

Respectfully submitted,

8 MEYERS, NAVE, RIBACK, SILVER & WILSON

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10
11 By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On July 3, 2013, I served true copies of the following documents described as **DEFENDANT CITY OF SAN JOSE'S SUPPLEMENTAL MOTION IN LIMINE TO EXCLUDE AFSCME WITNESSES CAROL GARCIA AND PEGGY HORNING FROM TESTIFYING AT TRIAL** on the interested parties in this action as follows:

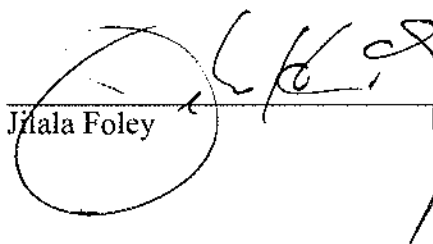
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address kthomas@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 3, 2013, at Oakland, California.



Jhala Foley

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(Santa Clara Superior Court Case No. 112CV225926)

AND

Necessary Party in Interest, THE BOARD OF
ADMINISTRATION FOR THE 1961 SAN JOSE
POLICE AND FIRE DEPARTMENT RETIREMENT
PLAN
(Santa Clara Superior Court Case No. 112CV225928)

AND

Necessary Party in Interest, THE BOARD OF
ADMINISTRATION FOR THE 1975 FEDERATED
CITY EMPLOYEES' RETIREMENT PLAN
(Santa Clara Superior Court Case Nos. 112CV226570
and 112CV226574)

AND

Necessary Party in Interest, THE BOARD OF
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